WISCONSIN INSTITUTE FOR LAW & LIBERTY

September 12, 2022

RE: Public Comment on Document Number 2022-13734 and Docket ID ED-2021-OCR-0166

To Whom it May Concern,

The Wisconsin Institute for Law & Liberty (WILL) is a non-profit public-interest law and policy organization dedicated to the rule of law, individual liberty, constitutional government, and a robust civil society. We are writing to submit a public comment on the proposed changes to the U.S. Department of Education's regulations to raise significant concerns pertaining to the Department's incorrect and illegal reinterpretation of Title IX's definition of sex.

WILL believes that the proposed rule will have a harmful effect on individual rights. Therefore, the proposed regulations raise several issues that the Department must address:

1. The Department's reinterpretation of Title IX is an illegal action by an executive agency because the proposed regulations are antithetical to the law's intent – namely, to protect and support women and girls.
2. The Department's proposed regulations will have a chilling effect on speech, including speech motivated by sincere religious beliefs, and academic freedom.
3. The Department's proposed regulations undermine parental rights by requiring public elementary and secondary schools to affirm a child's gender identity without the approval or knowledge of his or her parents.

WILL requests that the Department respond to each of these concerns and reject the proposed rules that will create great harm for students, parents and schools receiving federal aid.

1. <u>The Department's proposed rules are an illegal interpretation of Title IX because the Department is acting outside of the scope of the law.</u>

The intent of Title IX is to outlaw sex discrimination in education so that women and girls are treated equally. *See* 20 U.S.C. § 1681(a). Any institution that receives federal funds must comply with the Title IX. This law was clearly intended to support women. But since its passage, Congress has not voted to amend Title IX to specifically redefine "sex" as including gender or gender identity.

The proposed rules illegally expand the scope of Title IX, to include, among other things, "gender" and "gender identity." This goes well beyond the statutory scope

established by Congress. The Department does not have the authority to extend the definition of the law. The U.S. Supreme Court recently reaffirmed that our Constitution's requirement for separation of powers means that executive agencies may not adopt regulations that go beyond the scope of the laws written by Congress. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

Furthermore, the Department is relying on President Biden's executive order 13988, 86 FR 7023 (Jan. 25, 2021), which is an incorrect interpretation of the decision by the U.S. Supreme Court in *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020). The *Bostock* Court expressly limited its decision to Title VII and emphasized that Title IX and "other federal or state laws that prohibit sex discrimination" were not "before" the Court. 140 S. Ct. at 1753.

The logic of *Bostock* was limited to discrimination based on the cultural expression of gender, i.e., how an employee dressed or otherwise presented herself. A broad prohibition of discrimination based on gender identity, now permitting discrimination on the basis not of one's sex, but one's decision to identify as one gender or another and arguably require broad accommodation of that decision such as, for example, the right to participate on the athletic teams or occupy housing reserved for the gender to which one seeks to transition. Such a radical change in the law should be adopted by Congress and not by administrative fiat.

Therefore, Executive Order 14021, 86 FR 13803 (Mar. 11, 2021), which directed the U.S. Department of Education to implement this reinterpretation of Title IX in its regulations, is an illegal agency action and the rule must be rejected.

2. The Department's proposed regulations will chill and compel speech, violating the First Amendment.

Students' speech is protected at all public schools and universities under the First Amendment. But these proposed regulations will likely result in chilled speech by creating gender identity as a protected class and then opening the door for universities and public schools to compel individual's speech via the use of "preferred pronouns."

In Wisconsin, we have already seen the effect of this compelled speech effort for a perceived protected class of gender identity. We recently represented three young middle school age children who were under a Title IX investigation by the Kiel Area School District for not using "they, them" pronouns for one of their peers. As the Department is aware, such an investigation could have resulted in discipline and consequences that could have followed these students to college and beyond – all because the students at issue did not feel comfortable using pronouns that didn't comport with the basic rules of grammar. Ultimately the school district dropped the investigation, but it was a concerning peek into the future of education under these proposed rules.

Additionally, the proposed changes radically lower the threshold for what counts as "harassment" and indicate that speech surrounding gender identity issues will be subject to campus disciplinary procedures. For example, the proposed rules define verbal "harassment," which is punishable under the rules, as any "unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment)." This departs from traditional definitions of harassment, limiting it to conduct that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. See, e.g., *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629 (1999) Such a capacious standard ostensibly applies to any speech to which a transgender person may object and will have a chilling impact on protected speech.

Any Title IX regulation by the Department must ensure its grievance process is not used to punish people for exercising their right to free speech in academics, even if the speech is offensive to another. But the proposed regulations define sexual harassment so broadly that it will require school administrators to police the use of pronouns and limit academic speech. For example, students debating the hot-button issues of abortion may be limited in speaking scientific truth by these regulations. It is not farfetched to imagine that a scientifically accurate statement like "only women can get pregnant," (which, even five years ago was not seriously debated by anyone) could result in a Title IX investigation under these overly broad regulations.

Furthermore, the proposed rules create mandates for schools to counter "derogatory" speech and restrict such speech to the extent permissible under the First Amendment. Specifically, the statement says "For instance, although the First Amendment <u>may</u> prohibit a recipient from restricting the rights of students to express opinions about one sex that may be considered derogatory, the recipient can affirm its own commitment to nondiscrimination based on sex and take steps to ensure that competing views are heard. The age of the students involved and the location or forum in which such opinions are expressed may affect the actions a recipient can take consistent with the First Amendment." *See* proposed regulation comment pg. 41415

The proposed rules also remove a critical statement about First Amendment rights. Section 106.71 currently states "The exercise of rights protected under the First Amendment does not constitute retaliation." But the proposed regulations remove this language and instead replace it with the following - "Accordingly, when taking reasonable steps to protect the privacy of the parties and witnesses, a recipient must be mindful of the rights protected by the First Amendment, when relevant." *See* § 106.45

Finally, the proposed regulations' impact on speech also applies to those whose views may be grounded in sincere religious beliefs. The proposed drastic expansion of the definition of harassment, for example, will force some students, student groups, and employees to choose between living in accordance with their personal convictions and risking becoming the subject of a complaint investigated under a subjective standard with reduced protections.

For example, a group of Jewish students may focus on language in the Torah emphasizing the male and female nature of God's creation (*see* Genesis 5:2) or a Christian student group may point to Jesus' teachings on the topic (*see* Mark 10:6). But the Title IX regulation could result in a loss of funding, or even investigation into, these groups simply for expressing sincerely held religious beliefs, in violation of the Free Exercise Clause of the First Amendment.

3. <u>The Department's proposed regulations undermine parental rights by requiring public elementary and secondary schools to affirm a child's gender identity without the approval or knowledge of his or her parents.</u>

All parents have the right to direct the upbringing of their children, including their education. But the proposed rules could violate parental rights for elementary and secondary students. For instance, the proposed rules empower school officials to look for sex-based harassment outside of the school. *See* § 106.11 This could lead to school officials questioning parent's decisions regarding their child's gender identity in their home.

Similarly, these proposed regulations requirement for any employee, including teachers, to "notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX" could lead to more school district policies that withhold information about a child's preferred gender identify from their parents. *See* §106.44(c)

WILL has been litigating these exact harmful policies in school districts across Wisconsin. One of our clients experienced the impact of these proposed rules firsthand, when her child's school wanted to affirm her daughter's interest in transitioning without the parent's consent. But our client, after researching issues related to gender dysphoria and realizing her daughter did not meet the medical definition of that disorder, asked the school to refer to her child by her biological sex and corresponding pronouns while arranging for supportive mental health care for the child. The district refused and the parent removed her child. With medical assistance and family support, our client's daughter eventually decided that she did not want to transition.

Research shows that students are impacted by people of authority in their life, including their teachers and school administrations. Requiring these "individuals of authority" to affirm a child's gender identity, without input from

medical professionals and their parents, creates a greater risk of harm to that child. School administrators and teachers are not trained medical professionals and cannot assess a child's mental state, their medical needs and the best way to serve students with gender dysphoria.

Additionally, federal agencies must assess the impact of proposed regulations on families and the U.S. Department of Education must conduct this assessment for these rules.

Specifically, the Treasury and General Government Appropriations Act states:

> (1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment;
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> (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children;
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> (3) the action helps the family perform its functions, or substitutes governmental activity for the function;
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> (4) the action increases or decreases disposable income or poverty of families and children;
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> (5) the proposed benefits of the action justify the financial impact on the family;
>
> (6) the action may be carried out by State or local government or by the family; and
>
> (7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society. See, Pub. l. 105-277 (1999)

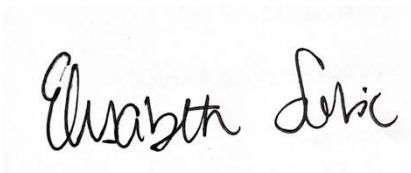
The Department has not addressed these provisions, including the proposed regulation's impact on parental rights in education. We urge the Department to consider the role of parents and reject the proposed rules.

We urge the Department to address these critical issues and reject the proposed rules. If the Department decides to move forward with these proposed rules, we believe that they will not survive a legal challenge due to several legal issues, detailed throughout this comment.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Richard Esenberg
President & General Counsel



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